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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

On the Report of the Special Master

BRIEF FOR THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA, AND THE STATE OF CALIFORNIA IN RESPONSE TO EXCEPTIONS OF THE STATES OF DELAWARE AND NEW YORK TO THE REPORT OF THE SPECIAL MASTER

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QUESTIONS PRESENTED

1. Whether the Special Master correctly concluded that, when the identity and address of the ultimate intended recipient of a securities distribution are unknown, the State of the issuer of the security on which the distribution was paid has escheat priority—under the backup rule of *Texas* v. *New Jersey*—over the State of whatever financial intermediary happens to be holding the distribution when it becomes stuck in the course of transmission.

2. Whether the Special Master correctly rejected the claim of the State of New York that it is entitled—under the primary rule of *Texas* v. *New Jersey*—to owner-unknown distributions held by brokerage-firm intermediaries because the next intermediary in the chain of distribution is theoretically knowable.

3. Whether, as the Special Master has proposed, an issuer's location for purposes of the backup rule should be defined as the State in which the issuer maintains its principal executive offices because (a) it is far more equitable to look to that State than to use State of incorporation as a proxy, and (b) "principal executive offices" information is now readily accessible from issuers' public filings.

4. Whether the Special Master correctly concluded that all of the funds in dispute in this case should be distributed in accordance with his recommendations that (a) escheat priority be given to the State of the issuer, and (b) the issuer's State should be defined as the State in which it maintains its principal executive offices.

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INTRODUCTION

This consolidated brief is submitted on behalf of thirty-one States in response to the Exceptions filed by plaintiff Delaware and defendant New York to the Report of Special Master Thomas H. Jackson, dated January 28,

1992 ("Report").[1] These thirty-one States respectfully urge the Court—as do sixteen other States and the District of Columbia—to adopt and enter the proposed decree set forth as Appendix A to the Report.

The Special Master's Report and proposed decree interpret and apply the rules delineated in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), with respect to the escheat of securities distributions (*e.g.*, dividends and interest payments) that become stuck in the hands of financial intermediaries (*e.g.*, brokerage firms, banks, and depositories) in the course of transmission from the originators (*i.e.*, governmental and corporate issuers of securities) to the ultimate intended recipients (*i.e.*, their beneficial owners), when the names and addresses of those recipients are unknown.[2]

All fifty States and the District of Columbia have appeared in this case.[3] Forty-seven States and the Dis-

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[1] Exceptions and Brief in Support for Plaintiff, State of Delaware (May 1992) ("Del. Br."); Exceptions of the State of New York to the Report of the Special Master (May 26, 1992) ("N.Y. Br.").

[2] As the Report explains, most States exercise a "custodial taking" power over intangible property subject to potential rights of superior claimants, rather than outright "escheat." Report 2 n.1. For convenience, briefs before the Special Master and the Master's Report itself generally use the terms interchangeably. We continue this practice in this brief.

[3] Delaware served its Complaint on "each of the other states, in order that any other state which might believe it has some claim to the [unclaimed distributions] may seek leave of this Court to intervene in these proceedings." Complaint of Delaware at 2-3, ¶ 5 (Feb. 9, 1988). Every remaining State (and the District of Columbia) has since accepted Delaware's invitation and has intervened, or sought leave to intervene, in this case. This Court granted Texas's motion for leave to intervene on February 21, 1989, and referred the motions subsequently filed by the other States and the District of Columbia to the Special Master. The Special Master has recommended that the Court grant all of these motions, including those filed by the undersigned States. For the reasons stated in Appendix C to the Report, we urge the Court to adopt the Special Master's recommendation with respect to intervention.

trict of Columbia endorse the Special Master's recommendations in their entirety.[4] The only substantive exceptions to the Report are taken by Delaware and by New York, which seek disproportionate amounts of unclaimed distributions (to a large extent on conflicting theories) based, respectively, on the fortuities that a large majority of financial intermediaries either (1) are incorporated in Delaware or (2) are incorporated in New York State or maintain offices in New York City.

The Special Master's statement of the undisputed facts and his carefully reasoned analysis and application of the principles prescribed in *Texas* v. *New Jersey* are the most forceful arguments for fully accepting his recommendations. This brief, therefore, is limited to responding to the attacks that Delaware and New York level upon the Master's Report.

STATEMENT

As in the Court's earlier original actions of *Texas* v. *New Jersey* and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), this controversy centers on competing claims by States to escheat unclaimed funds. The precise question presented is how the "backup rule" delineated in *Texas* v. *New Jersey*—a rule intended to govern unclaimed property that cannot be disposed of under the Court's "primary rule"[5]—should be applied to unclaimed securities distributions taken by New York. To be determined is

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[4] Massachusetts has sought leave to intervene, but has taken no position either before the Master or this Court. Although Michigan, Maryland, Nebraska, and the District of Columbia have filed a document entitled "Exceptions" and a brief in support thereof, their position is that they "endorse the Master's result, although [they] think it is possible to improve upon it." Brief at 2.

[5] Under the primary rule of *Texas* v. *New Jersey*, escheat is to the State of the last known address of the ultimate intended recipient (termed the "creditor" by the Court). Property escheats under the backup rule when the name and address of the intended recipient are unknown.

whether the State of the issuer or the State of the intermediary is to be accorded priority under the federal common law rules announced in *Texas* v. *New Jersey*. The Special Master recommends the former.[6]

The Special Master's Report followed extensive discovery from both parties and representative non-parties to elucidate the nature of the securities distribution system, the transactions involved in this case, and the roles of the various participants in them. *Inter alia*, depositions were conducted of the principal securities depository company, three brokerage firms, and a major bank acting as both a dividend disbursing agent and a custodian of securities. The Special Master received several rounds of briefs and heard extensive oral argument. Four months after oral argument, he circulated a draft of his Report to the parties for fact-checking and comment; every party commented. There were then two supplemental rounds of briefing before the Master issued the final Report.[7]

The undisputed facts show that it is now common to have multiple intermediaries involved in distributing cash

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[6] The Special Master also recommends, separately, a "minor change" in the criterion for defining the location of the issuer from that articulated in *Texas* v. *New Jersey*. That recommendation, discussed *infra* at 7, 45-53, does not affect the fundamental choice between the State of the issuer and the State of the conduit intermediary.

[7] Professor Thomas H. Jackson, the former Dean of the University of Virginia School of Law, is a recognized authority on debtor-creditor relations. *E.g.*, *Security Interests in Personal Property* (2d ed. 1987) (with Douglas G. Baird); *The Logic and Limits of Bankruptcy Law* (1986); *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155 (1989) (with Robert E. Scott); *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393 (1985); *Possession and Ownership: An Examination of the Scope of Article 9*, 35 Stan. L. Rev. 175 (1983) (with Douglas G. Baird); *Embodiment of Rights in Goods and the Concept of Chattel Paper*, 50 U. Chi. L. Rev. 1051 (1983).

and stock dividends, interest, and other payments from a corporate or governmental securities issuer to the ultimate recipients of those distributions, *i.e.*, to the beneficial owners of the stocks and bonds. Following the "paperwork crisis" of the late 1960s, the securities industry created a centralized certificate depository so that brokerage firms could "deliver" securities to each other simply by making accounting entries on the depository's books. This function is now performed by the Depository Trust Company ("DTC"), a limited purpose trust company incorporated in New York, which serves as a national depository for every segment of the industry. All securities certificates in this depository are registered in the name of DTC's nominee, Cede & Co., and held by DTC in fungible masses.[8] Additionally, a large and growing percentage of investors leave their securities in the possession of their brokerage firms or banks, which results in the securities' being held in the intermediary's "street name" or nominee name.

The result is that the issuers or, more commonly, their paying agents, make a large volume of distributions of dividends and interest to intermediary record owners that are not the beneficial owners. If the record owner is a depository, the depository then passes the distributions on to its participating banks and brokerage firms, which in turn pass them on to their customers—the beneficial owners—or to other intermediaries,

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[8] As of December 31, 1989, DTC's inventory of deposited securities had a market value of four trillion dollars, representing approximately 98 percent of the total estimated market value of securities held by all U.S. depositories. 1989 DTC Annual Report at 5 (appended as Exhibit 1 to Brief in Support of Motion for Partial Summary Judgment of the Plaintiff-Intervenor States of Alabama, *et al.* (Oct. 30, 1990) ("Brief in Support of Alabama, *et al.*")). DTC holds approximately 75 percent of all outstanding corporate and municipal debt and equity securities. Brief of *Amici Curiae* [Securities Industry Association, *et al.*] in Response to the Report of the Special Master 3 (May 26, 1992) ("SIA *Amici* Br.").

which in turn pass them on to their customers. Thus, a distribution typically will pass through the hands of several intermediaries in its transmission from the issuer to the ultimate intended recipient. The role of all these intermediaries in this regard is simply to transmit, or to assist in the transmission of, the issuer's distribution to the beneficial owner.

In a very small fraction of these cases (which nonetheless amount to substantial dollars in the aggregate), the issuers' payments become "stuck" with one or another intermediary because the intermediary is unable to determine to whom to transmit them. Report 10. All of the intermediaries that have testified, or filed briefs, in this case agree that the owners of the undelivered distributions at issue in this case are unknown. *Id.* 10-11 & nn.8 & 10.[9]

The Report makes two principal recommendations for resolving competing state claims to such owner-unknown, unclaimed securities distributions held by intermediaries, *i.e.*, distributions whose owners' addresses are unknown and therefore to which the *Texas* v. *New Jersey* primary rule cannot be applied.

First, the Report finds that this Court's backup rule in *Texas* v. *New Jersey* gives priority to the State of the issuer that originated the distribution rather than to the State of the conduit intermediary. The Report concludes that (1) use of the term "debtor" in the original formulation of the backup rule was descriptive only; (2) this Court did not incorporate mechanistically the debtor-creditor laws of the various States; (3) the fundamental economic relationship is between the issuer and the bene-

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[9] *Amici* Midwest Securities Trust Company and Philadelphia Depository Trust Company, two relatively small securities depositories, have advised the Court that they assert an ownership interest based upon their respective depository rules in the unclaimed distributions held by their participating intermediaries. These *amici* do not dispute, however, that the distributions in this case are owner-unknown. Whether such private agreements must give way to a State's unclaimed property statute is not before this Court.

ficial owner; and (4) with respect to a securities distribution, allocation to the State of the issuer rather than to the State of the financial intermediary best comports with the principles and purposes set forth in *Texas* v. *New Jersey*.

In making this recommendation, the Report rejects under the backup rule both New York's claim to all of the unclaimed distributions that it has seized from DTC and New York-incorporated banks, and Delaware's claim to all of the unclaimed distributions that New York has taken from Delaware-incorporated brokerage firms. The Report also categorically rejects New York's separate and inconsistent attempt to justify—under the primary rule—its seizure of distributions held by brokerage firms that have an office in New York City, regardless of the State of their incorporation. The Report finds baseless New York's contention that those particular distributions should be considered owner-known on the strength of New York's assertion that it theoretically could establish that a securities certificate on which a particular unclaimed distribution was paid was forwarded to another broker with a so-called "trading address" in New York, since New York does not even contend that any such other broker would necessarily have held the certificate on the record date, much less be the ultimate intended recipient of the distribution. Report 58-67.

Second, the Report separately recommends that the definition of an issuer's location under the backup rule be modified to be the State in which the issuer maintains its "principal executive offices," as specified on filings required by the Securities and Exchange Commission, rather than the State of its incorporation.[10]

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[10] When the issuer cannot be identified, then and only then would the Report allow escheat to the holding intermediary's State. Report 57. No exception has been raised by any party to this tertiary rule. Additionally, the proposed decree requires, pursuant to *Texas* v. *New Jersey*, that any distribution for which an address of the

Lastly, the Report concludes that the decision in this case should be applied to all disputed property taken by New York. The Report finds that there should be no bar to complete application of the first recommendation (the priority of the State of the issuer over the State of the intermediary) because, among other reasons, the recommendation "is a logical interpretation of prior precedents in this area" (*id.* 73), and therefore not law-changing within the meaning of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Although the proposed change in the backup rule's locational definition "come[s] closer to meeting" this threshold *Chevron Oil* test, the Report finds that New York lacked the requisite reliance because New York has not taken any distributions as the State of incorporation of the issuer.[11] The Report further finds that New York does not have any remedial defenses, such as statute of limitations or laches, and that any hardship New York might face "represents a calculated risk New York has imposed on itself, and not an unjust surprise or unfair burden." Report 76 n.68.

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underlying security's beneficial owner is known must be given, under the primary rule, to the State of that address if consistent with that State's own escheat laws. *Id.* A-2 to A-3 (Proposed Decree, ¶ 2).

[11] New York has taken distributions under a custodial-taking statute that is so plainly inconsistent with *Texas* v. *New Jersey* that New York does not even attempt to defend it in its own terms. The Abandoned Property Law ("APL") under which New York has taken custody of such funds purports to authorize that State, for example, to seize all unclaimed distributions "received" in New York "by a broker or dealer or nominee of such broker or dealer," APL §§ 511(1), 511(1-a), as well as all unclaimed distributions "held or owing" by banking organizations (including DTC) in New York, APL § 300(1)(e). New York's statutes therefore allow New York to recover unclaimed distributions even when it is undisputed that the last known address of the owner of the property is in another State or, as to owner-unknown property, that the "debtor" is domiciled in another State.

SUMMARY OF ARGUMENT

I. The Special Master's interpretation and application of the backup rule of *Texas* v. *New Jersey* as giving priority to the State of the originator of unclaimed distributions is faithful to the holding and policies of that decision, is the fairest rule, is easily administered, and is acceptable to all but two States. The arguments advanced by Delaware and New York in favor of the State of the intermediary rest entirely upon the erroneous premise that this Court's decision in *Texas* v. *New Jersey* meant to incorporate state debtor-creditor law mechanistically into its backup rule. This state law premise fundamentally misconceives the rationale of *Texas* v. *New Jersey*. The federal rules prescribed in that case give priority—where, as here, it is consistent with ease of administration—to the State of the entity whose economic activities created the unclaimed securities distribution, *i.e.*, the issuer of the security, rather than to the State of whatever intermediary happens to be holding that distribution when a breakdown occurs in its transmission. The Report thus correctly rejects under the backup rule New York's claim to the owner-unknown distributions it has seized from DTC and banks, as well as Delaware's claim to the distributions that New York has taken from Delaware-incorporated brokerage firms.

II. The evidence is undisputed that the distributions New York has seized from brokerage firms are also owner-unknown and therefore subject to the backup rule. Before this litigation commenced, New York publicly acknowledged that these distributions are owner-unknown. New York's current argument that property taken from brokerage firms (but not from DTC and banks) is owner-*known* within the meaning of the primary rule is a *post hoc* effort to justify its taking under a statute that authorizes New York to recover unclaimed distributions that are, without more, "received in" New York. Furthermore, New York's contention that the property should be considered owner-known because, in theory (but not as a practical

matter), New York might be able to identify the next (but not final) link in the broken distribution chain, depends upon a string of unsupported presumptions, and proves nothing about who owns the property.

III. The Court should adopt the Special Master's recommendation that the location of an issuer for purposes of the backup rule be defined as the State in which the issuer maintains its principal executive offices as reported on standardized SEC forms, which issuers of publicly traded securities are required to file and which are today readily accessible through computer databases. It is far more equitable to define an issuer's location as the State in which it maintains its principal executive offices, among other reasons, because this definition more closely rewards the State in which the intangible property was created. Because using principal executive offices as a reference point would now have the same virtues of clarity and ease of administration as using State of incorporation, its adoption would significantly further the policies underlying *Texas* v. *New Jersey*.

IV. The Special Master's recommendations should apply to all of the funds New York has wrongfully seized. Both the Master's choice of the State of the issuer and his rejection of New York's primary rule theory involve the interpretation and application of governing precedent. The Master's proposed modification of the backup rule's locational definition is an acknowledged change in law, but New York's taking statute and practices are inconsistent with any claim that it has relied to its detriment upon the locational definition used in *Texas* v. *New Jersey*. Those seizures that New York now defends under the backup rule were made under a statute that New York does not even attempt to defend in its own terms—a statute reaching all unclaimed intangible property "held or owing" in New York. Moreover, since New York does not even claim to have taken these distributions as the State of the issuers, it could not have relied upon the use of State of incorporation in *Texas* v. *New Jersey* as a proxy for an issuer's location.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY INTERPRETED AND APPLIED THE "BACKUP RULE" OF *TEXAS* v. *NEW JERSEY* TO GIVE THE STATE OF THE ISSUER PRIORITY TO ESCHEAT UNCLAIMED SECURITIES DISTRIBUTIONS WHEN THE IDENTITY AND ADDRESS OF THE BENEFICIAL OWNER ARE UNKNOWN

Both Delaware and New York take issue with the Special Master's interpretation and application of the federal rules of escheat delineated in *Texas* v. *New Jersey*, arguing, based essentially on state debtor-creditor law, that those rules favor the intermediary holder of unclaimed securities distributions. For the reasons set forth below, Delaware and New York misperceive the Court's decision in *Texas* v. *New Jersey*. Far from incorporating various technical definitions of state law as they might change over time, or vary from State to State, the Court there explicitly set out to establish overarching federal rules of equitable priority to supersede state laws. When the beneficial owner's last known address cannot be determined, the backup rule established by this Court intended to give escheat priority to the State of the entity whose economic activities created the unclaimed intangible property.

Delaware and New York argue against this result on the strength of an overly mechanistic application of the terms "debtor" and "creditor," ostensibly required by *Texas* v. *New Jersey* and *Pennsylvania* v. *New York*. Their briefs are thus largely devoted to technical arguments as to why each intermediary in the chain of distribution assumes and then relinquishes the status of "debtor" under state law as it first receives and then passes along payments to the next intermediary. These two States then extrapolate that whatever intermediary happens to possess funds when they become "stuck" is a "debtor" within the meaning of the *Texas* v. *New Jersey*

rule and that, as a simple matter of *stare decisis*, the State of that intermediary is entitled to seize the funds.

As Justice Cardozo observed in *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1934), "the tyranny of labels" is a "fertile source of perversion" in legal analysis. When "a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations," soon thereafter "another situation is [sought to be] placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Id.* "In such circumstances the solution of the problem is not to be found in dictionary definitions * * *." *Id.* at 115. Rather, it is to be found in an analysis of the Court's original purpose. In a similar vein, this Court has stated that "literalness may strangle meaning," *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946), and has cautioned against the "hazards of placing too much weight on a few words or phrases of the Court," *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 670 (1970).

The Delaware-New York approach disregards these admonitions, and attempts to force federal rules of priority into the confining labels of state law concepts used in other contexts to meet other needs. It seeks to steer the *Texas* v. *New Jersey* analysis away from its core purposes—fairness and ease of administration—by pursuing dictionary definitions of "debtor" (Del. Br. 32) and commercial law rules-of-thumb as to when a corporation that has paid dividends to the record owner may or may not be liable to the beneficial owner (N.Y. Br. 61). Delaware and New York attempt to legitimize their focus on labels by waving the banner of *stare decisis*. As they are fully aware, however, no party, nor the Special Master, asks this Court to overrule *Texas* v. *New Jersey*. Instead, the issue is interpreting that decision and applying it properly in the particular context presented here.

A. The Special Master's Interpretation Of *Texas* v. *New Jersey* Is Faithful To The Holding And Rationale Of That Case

Prior to 1965, this Court had broadly affirmed the power of individual States to escheat intangible property, thereby encouraging States to enlarge the coverage of their escheat statutes in a manner that inevitably led to interstate conflicts.[12] Individual States were defining terms such as "holder" and indeed, as we explain below, "debtor" expansively so as to extend their escheat statutes to the outermost jurisdictional limits. The Court's express purpose in *Texas* v. *New Jersey* was to bring order out of a chaos of conflicting state laws by establishing federal priority rules to prevent overlapping exercises of state power. 379 U.S. at 677.[13] The task the Court there set for itself was thus altogether different from the Court's approach in unrelated decisions, cited by Delaware and

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[12] *Compare, e.g., State* v. *F.W. Woolworth Co.*, 45 N.J. Super. 259, 132 A.2d 550 (1957) (allowing New Jersey to escheat a foreign corporation's unclaimed dividends payable to shareholders whose last known addresses were in New Jersey), *with State* v. *American Sugar Ref. Co.*, 20 N.J. 286, 119 A.2d 767 (1956) (upholding New Jersey's power to escheat unclaimed dividends of a New Jersey corporation payable to persons whose last known addresses were in other States).

This Court noted in *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 79 n.5 (1961), that at least twenty States had enacted legislation during the previous fifteen years to bring or enlarge the coverage of intangible transactions under their escheat statutes. The Court held in *Western Union* that Pennsylvania's attempt to escheat unclaimed money orders held by Western Union violated due process because a judgment of escheat for Pennsylvania would not protect the company from multiple liability to other States. *Id.* at 76-77. The opinion invited the States to invoke the Court's original jurisdiction to fashion federal rules to allocate escheat power among the States. *Id.*

[13] *See also Western Union Tel. Co.*, 368 U.S. at 79; *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 443-45 (1951) (Frankfurter, J., dissenting); *Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 563 (1948) (Jackson, J., dissenting).

New York, in which jurisprudential considerations favored allowing state-law regimes to define the circumstances under which federal "common law" rules would operate within a particular State.[14]

In *Texas* v. *New Jersey*, four States were seeking to escheat all or part of uncollected funds that Sun Oil Company had unsuccessfully attempted to distribute to approximately 1,730 "small creditors." 379 U.S. at 675. The moneys in question ran the gamut from wages and payments to suppliers, to oil and gas royalties and "mineral proceeds," to cash and stock dividends payable to shareholders. *Id.* at 675 n.4.

The Court began its analysis by emphasizing its responsibility to adopt federal rules that would settle—on the equitable basis of fairness and ease of administration—competing state law claims. *Id.* at 677. Noting the constitutional inability of individual States to resolve the controversy and the absence of federal legislation, the Court asserted its "responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property." *Id.* The intent of the opinion was plainly to prescribe generally applicable rules of equitable priority among the States with respect to escheat of intangible property.

The Court specifically rejected approaches that would have had those rules hinge upon details of state law. The Court, for example, dismissed out of hand Texas's con-

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[14] This Court borrowed state law in those cases because private parties had ordered their affairs in reliance on that state law or because the Court was reluctant to disturb a state-law regime. *See, e.g., Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 (1991) ("private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards") (*cited in* Del. Br. 48). By contrast, "here, the federal rule is not attempting to fit the federal government into a state debtor-creditor regime." Report 30 n.28.

tention, argued at some length,[15] that royalties, rents, and mineral proceeds were entitled to special treatment because they were "real" property under Texas law. *Id.* at 679 n.9. It likewise rejected Texas's "most significant contacts" proposal, even though Texas had cited "numerous recent decisions of state courts dealing with choice of law in private litigation" espousing such a test. *Id.* at 678 & n.7. The Court also refused to allow its priority rules to be confined by "technical legal concepts of residence and domicile" under state-law regimes. *Id.* at 681.

New Jersey's "State of incorporation" proposal was disallowed because "it seems to us that in deciding a question which should be determined primarily on principles of fairness, [New Jersey's proposed rule] would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Id.* at 680. The Court viewed Pennsylvania's proposal of giving priority to the State of the company's principal place of business as "more persuasive" because it was "probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." *Id.* Nonetheless, the Court feared that the subjective nature of Pennsylvania's proposed "principal place of business" test would require too much fact-specific, case-by-case analysis. *Id.*

The Court instead adopted the "primary rule" proposed by intervenor Florida and recommended by its Special Master, holding that, wherever feasible, "the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." *Id.* at 680-81. The Court justified its choice primarily on grounds of fairness and

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[15] *See* Texas's Exceptions to the Report of the Special Master and Supporting Brief, *Texas* v. *New Jersey*, No. 13 Original, at 28-38 (Feb. 14, 1964).

simplicity. The rule was fair because, *inter alia*, it would "tend to distribute escheats among the States in the proportion of the commercial activities of their residents." *Id.* at 680.

For situations in which there is no record of any address or where the last known address is in a State that does not provide for escheat of the property, the Court prescribed what has come to be called the "backup rule." In such situations the State of corporate domicile may escheat the property, subject to any right that another State might subsequently establish under the primary rule. *Id.* at 682. The Court justified this backup rule (also proposed by its Special Master) on the ground that it would be "conducive to needed certainty" in dealing with a problem that seemed "likely to arise with comparative infrequency." *Id.*

In conclusion, the Court explained that the process by which it arrived at the primary and backup rules was "not controlled by statutory or constitutional provisions or by past decisions, nor [was] it entirely one of logic." *Id.* at 683. Rather, it was

> fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States.

Id. Significantly, both the primary rule and the backup rule were objective and focused, respectively, on the ultimate intended recipient of an unclaimed payment (referred to as the "creditor") and on Sun Oil as the originator of those payments (referred to as the "debtor"), even though, as we discuss further at pp. 19-22, *infra*, there were in some instances intermediaries between Sun Oil and its "creditor."

There is no basis for inferring that the Court *sub silentio* incorporated into its priority rules whatever def-

initions of "debtor" might be developed under varying state laws. Any such inference would be at odds with the Court's explicit refusal to adopt state property laws, state conflicts laws, and state residence and domicile laws. It also would be inconsistent with the Court's persistent refusal to allow state laws to determine the rules of decision in other original jurisdiction actions involving the just apportionment of rights among the States. *E.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 184 (1982); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669-71 (1931). As Justice Stewart observed in *California* v. *Texas*, 437 U.S. 601, 613 (1978) (concurring opinion), "when this Court exercises its original jurisdiction to settle a dispute between two States it does not look to the law of each State, but rather creates its own rules of decision."

The Special Master's approach here comports with this Court's approach not only in such analogous original jurisdiction cases, but also in cases involving construction of terminology used by Congress. In construing federal statutes, the Court starts with the general premise that Congress would not have intended to make the application of federal law depend upon the vagaries of state law. *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989). This rule of construction is based upon two principal concerns: (1) that rigidly applying state law concepts could disrupt the uniformity of the federal law, *id.*, and (2) that it also could impair the underlying purposes of the federal program, *id.* at 44.[16]

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[16] In *Holyfield*, the Court held that state law of "domicile" does not control the determination whether children are "domiciled" in an Indian reservation within the meaning of the Indian Child Welfare Act. 490 U.S. at 49. This Court has declined to allow federal rules to be constrained by state law definitions in numerous circumstances. *E.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) (parent and wholly owned subsidiary are not separate entities capable of conspiring with each other under Section 1 of the Sherman Act even though they may be two distinct legal entities under state law); *Burnet* v. *Harmel*, 287 U.S. 103

Both of these concerns apply with full force to the priority rules delineated in *Texas* v. *New Jersey*, which were expressly intended to achieve nationwide uniformity as well as to promote federal equitable policies bearing little, if any, relation to technical state commercial law principles. Moreover, here there is no reason for concern that a self-contained federal rule might unnecessarily upset the operation of state-law regimes. As noted by the Special Master, "whatever rule the Court adopts will not interfere with the method by which securities are distributed." Report 30 n.28.

Nothing in this Court's only other prior decision on escheat priority, *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), alters the above conclusions. That case dealt in relevant part with a situation in which neither the ultimate intended recipient nor the originator of an unclaimed payment could be identified or located in a particular State. At issue were money orders that Western Union was unable either to pay to the intended recipient or to refund to the sender. Consistent with *Texas* v. *New Jersey*, the Court recognized that if the State of the intended recipient's last address or the sender's last address could be determined, that State would have escheat priority. 407 U.S. at 213, 215. Where neither could be determined, however, and thus the only identifiable party was Western Union, the Court adopted its Special Master's recommendation that the funds be escheated to the State where Western Union was located. *Id.* at 214.[17]

B. The Delaware-New York Theory Is Inconsistent With *Texas* v. *New Jersey*

The Delaware-New York interpretation of "debtor" is not merely at odds with the jurisprudential underpinnings

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(1932) (state law treatment of oil and gas lease as a "sale" of oil is immaterial in deciding whether it is a "sale" of capital assets under federal tax law).

[17] We discuss Congress's legislative response to *Pennsylvania* v. *New York* on page 27 below.

of *Texas* v. *New Jersey*; it does not even succeed on its own terms as a workable explanation of the Court's conclusions in that case. Rather, applying state debtor-creditor law to the various distributions involved in *Texas* v. *New Jersey* would have led to the confused result of having no "debtor" in some circumstances and dual "debtors" in others. In addition, any such effort at determining who the "debtor" is in the Delaware-New York sense would in many situations require precisely the sort of fact-specific, case-by-case analysis that this Court intended to eliminate.

The Court's application of the term "debtor" to Sun Oil as an issuer of securities was necessarily no more than descriptive, without reference to technicalities of state law. To attempt to assign more significance to the "debtor" terminology, as suggested by the Delaware-New York theory, leads only to confusion.

Under generally accepted state common law principles, for example, Sun Oil could not have been characterized as a "debtor" with respect to its cash dividends. Sun Oil had deposited funds for the payment of the cash dividends into a special dividend account in a Philadelphia bank; after two years, unclaimed dividends were transferred from this special dividend account to a general Sun Oil account, also in Philadelphia.[18] Under state common law, the initial deposit made Sun Oil a trustee of the funds it had placed in the special account.[19] In other words, "the

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[18] Report of the Special Master, *Texas* v. *New Jersey*, No. 13 Original, at 11 (Dec. 2, 1963).

[19] *In re Associated Gas & Elec. Co.*, 137 F.2d 607, 610 (2d Cir. 1943); *Commissioner* v. *Scatena*, 85 F.2d 729, 731 (9th Cir. 1936); *In re Interborough Consol. Corp.*, 288 F. 334, 344-45 (2d Cir.), *cert. denied*, 262 U.S. 752 (1923); *Staats* v. *Biograph Co.*, 236 F. 454, 458 (2d Cir. 1916); *Bank of America Nat'l Trust & Sav. Ass'n* v. *Cranston*, 252 Cal. App. 2d 208, 60 Cal. Rptr. 336, 343-44 (1967); *State* v. *Jefferson Lake Sulphur Co.*, 36 N.J. 577, 178 A.2d 329, 334, *cert. denied*, 370 U.S. 158 (1962); *Sherry* v. *Union Gas Utilities*,

debtor and creditor relation [was] transformed into a trust relation." *In re Interborough Consol. Corp.*, 267 F. 914, 918-19 (S.D.N.Y. 1920). Moreover, since these trust funds could not be diverted for any other purpose, *In re Interborough Consol. Corp.*, 288 F. 334, 344-45 (2d Cir.), *cert. denied*, 262 U.S. 752 (1923); *State* v. *Standard Oil Co.*, 5 N.J. 281, 74 A.2d 565, 575 (1950), *aff'd*, 341 U.S. 428 (1951), a subsequent commingling of such funds with other funds—as apparently occurred in *Texas* v. *New Jersey*—would not have altered the trust relationship.[20] Thus, the Court's use of the term "debtor" to describe Sun Oil plainly was not based on state common law technicalities.

Even more confusion would have resulted from reference to the statutes of the three States involved in *Texas* v. *New Jersey*.[21] Only Pennsylvania's escheat statute used the term "debtor." Like other States, Pennsylvania sought to cast the net of its escheat laws as widely as possible, and thus defined "debtor" specifically to include, *inter alia*, (1) corporations that "have * * * declared dividends or profits," (2) banks that have received deposits of money, and (3) any person or entity holding property "in any fiduciary capacity whatsoever," or that continues to hold any portion thereof even "after the

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Inc., 20 Del. Ch. 60, 171 A. 188, 190 (1934); 11 William M. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5322, at 730 (1986).

[20] *See, e.g., In re Associated Gas & Elec. Co.*, 137 F.2d at 610; *State* v. *Jefferson Lake Sulphur Co.*, 178 A.2d at 333-34; *State* v. *Standard Oil Co.*, 74 A.2d at 573-76. *See generally* George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 924 (rev. 2d ed. 1982).

[21] Pertinent excerpts of these statutes were attached as appendices to Texas's brief in support of its motion for leave to file the complaint. Brief on Motion for Leave to File Bill of Complaint, *Texas* v. *New Jersey*, No. 13 Original, Appendix A (Texas statute), Appendix B (New Jersey statute), and Appendix C (Pennsylvania statute) (May 1, 1962).

termination of the fiduciary relation."[22] The statute defined "creditor" to include, *inter alia*, those "to whom dividends or profits have been declared," as well as "beneficial owners of any property, money, or estate, or of the profits, accretions, and interest thereon" held by any "debtor."[23] The result of reference to this state law in *Texas* v. *New Jersey* would have been to identify multiple "debtors" with respect to the same property. Both Sun Oil and an intermediary, for example, could be deemed "debtors" under Pennsylvania's statute.[24] This further buttresses the Special Master's conclusion in this case that looking to state definitions of "debtor" creates more problems than it solves.

Delaware and New York attempt to explain this Court's reference to the issuer in *Texas* v. *New Jersey* as a "debtor" on the theory that there, but not here, the intermediaries were transfer and paying agents who "act[ed] for the issuer." Del. Br. 40; *see also* N.Y. Br. 52. This

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[22] Pa. Stat. Ann. tit. 27, § 241 (1958), *quoted in* Brief on Motion for Leave to File Bill of Complaint at Appendix C-11 (May 1, 1962).

[23] *Id.*, *quoted in* Brief on Motion for Leave to File Bill of Complaint at Appendix C-11 to C-12 (May 1, 1962).

[24] For example, Sun Oil was a statutory "debtor" because it had "declared dividends or profits." The Philadelphia bank holding the cash dividends likewise appears to have been a statutory "debtor" because it had received deposits of money, and also because under general banking law it became a bailee, and thus a fiduciary, of the special account, 1 Raymond Natter, et al., *Banking Law* § 9.05, at 9-24 (1992), and continued to hold these funds even "after the termination of the fiduciary relation." Pa. Stat. Ann. tit. 27, § 241 (1958). *See generally Commonwealth* v. *Binenstock*, 358 Pa. 644, 57 A.2d 884, 886 (1948) (averment that defendant received money as agent or trustee properly alleged that defendant received the money in a fiduciary capacity under Pennsylvania escheat statute); Restatement (Second) of Agency § 13 (1958) (agent as fiduciary). *See also* Pa. Stat. Ann. tit. 27, § 332 (1958) (subjecting to escheat unclaimed property held by "any trustee, bailee or other depositary" in a fiduciary capacity); *Appeal of Rogers*, 361 Pa. 51, 62 A.2d 900, 903 (1949) (§ 332 reaches " 'every person who receives money to be paid to another' " (citation omitted)).

is a distinction without a difference. First, paying agents may be agents of owners as well as issuers.[25] Second, in any event, the question Delaware and New York themselves pose is whether such intermediaries are "debtors" under state law, and paying agents certainly appear to have been "debtors" under Pennsylvania's statute.[26] Delaware in fact concedes that, under the common law, the paying agents may have been "debtors" (of Sun Oil, but not of the beneficial owners), and merely argues that they are not the relevant "debtors" to which to look. Del. Br. 40 n.48.

The harder Delaware and New York try to justify applying a "debtor" approach wedded to state-law schemes, the clearer it becomes that their thesis depends on an intense fact-gathering mission for each case—precisely the exercise that this Court sought to minimize, not maximize. 379 U.S. at 680. New York points to a number of state cases decided before *Texas* v. *New Jersey* holding that a corporation would be protected from liability to the beneficial owner if it paid dividends to the record owner in "good faith." On these terms, New York seems to be arguing that issuers cannot generally be regarded as "debtors" once they make a distribution to the record owner. But no such clear-cut rule emerges from these

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[25] For example, the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa *et seq.*, which applies to most publicly-held corporate debt obligations, requires that a paying agent "hold in trust for the benefit of the indenture security holders or the indenture trustee all sums held by such paying agent for the payment of the principal of or interest on the indenture securities." 15 U.S.C. § 77qqq(b). Dividend disbursing agents may have similar relationships. *See* 1 *Corporation Guide* ¶ 903, at 905 (Prentice Hall Law & Business 1990) (some dividend disbursing agents will not return unclaimed dividends to the issuer, "arguing that they still remain liable to pay out the dividend"). For this reason, New York's contention (Br. 50-56) that "debtor" simply means "obligor" also does not solve the problem; to determine the "debtor," one must still choose among "obligors."

[26] *See supra* notes 22-24 and accompanying text.

cases—and certainly not one helpful to New York. There is, for example, the intensely fact-bound question of whether an issuer made a payment in "good faith." Moreover, an issuer remains a "debtor" under this analysis until the affirmative "good faith" defense is raised in connection with a claim against the issuer by the beneficial owner. *E.g.*, *Davis* v. *Fraser*, 307 N.Y. 433, 121 N.E.2d 406, 412 (1954) (*cited in* N.Y. Br. 61). In addition, these commercial cases have nothing to do with the law of escheat, and do not address the issue of escheat priority.

C. The Report's Recommended Application Of The Backup Rule Furthers The *Texas* v. *New Jersey* Policies Of Fairness And Ease Of Administration

1. *Escheat to the issuer's State is more equitable*

This Court stated in *Texas* v. *New Jersey* that the priority question "should be determined primarily on principles of fairness." 379 U.S. at 680. While Delaware complains that the Special Master approached this case "in populist terms" (Del. Br. 49), using "intuition" rather than logic or precedent (*id.*), in fact he hewed closely to the fairness criteria enunciated by this Court in *Texas* v. *New Jersey*. As a general matter, the allocation of unclaimed intangible property should "tend to distribute escheats among the States in the proportion of the commercial activities of their residents," 379 U.S. at 681, and reward the State "giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence," *id.* at 680. The Special Master's Report serves these goals by recommending the State of the issuer whose business activities gave rise to the intangible property over the State of whatever conduit intermediary happens to be holding those payments when they become "stuck." *See generally* Report 35-38.

New York concedes that the Master's fairness criteria were in fact derived from *Texas* v. *New Jersey* (N.Y. Br.

39), but argues that "fairness is not a concern under the *Texas* backup rule" (*id.* 69). The argument is badly overstated. To be sure, as the Special Master forthrightly acknowledged, this Court's primary focus in formulating the backup rule was upon ease of administration "because, as a rule to be used with relative infrequency (most cases being handled by the primary rule), it allowed the circle to be closed in a manner that provided easily-followed guidance to future cases." Report 17. This hardly means, however, that principles of fairness, which the Court used as its guide in promulgating the priority rules, 379 U.S. at 680, are irrelevant to the interpretation of the backup rule. Report 17. Thus, the Special Master's priority recommendation was appropriately sensitive to the objective of administrative convenience, but it also properly undertook to achieve the most equitable result.

New York argues in retreat that brokers, banks, and depositories "perform a multitude of functions" that should not be ignored in a fairness analysis. N.Y. Br. 71; *see also* Del. Br. 28-29. Even placing to one side the fact that intermediaries such as DTC have described themselves as endeavoring to preserve their "transparency as an element in the chain of communication between corporate issuers and the beneficial owners of their securities,"[27] no one—including the Special Master (Report 36)—denies that these intermediaries provide valuable services. The intermediaries in *Texas* v. *New Jersey* also provided valuable services, but that is not the point.

The point is that the fundamental economic relationship is between the issuer and the beneficial owner.[28] It is the

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[27] DTC, Shareholder Communications and The Depository Trust Company 3, 6 (2d ed.), *quoted in* Report 24-25.

[28] *See, e.g., Merrill Lynch Pierce Fenner & Smith, Inc.* v. *North European Oil Royalty Trust*, 490 A.2d 558 (Del. 1985) (holding by Delaware Supreme Court that, before issuing replacement certificates for those lost, stolen, or destroyed, a Delaware corporation may require brokerage houses to supply independent credible evi-

issuer that is responsible for creating additional wealth from the owner's capital investment. By contrast, all of the intermediaries in this case admit that the actual owners of the distributions seized by New York are unknown; these intermediaries are indeed mere conduits. Report 10-11 & nn. 8 & 10, 36-38.[29] To argue, as Delaware and New York do, that the State of a conduit intermediary such as DTC should have the superior equitable claim—as against, for example, the State of a company whose business acumen, technical expertise, efficiency, research and development, and other business activities have generated the profits that happen to get "stuck" at DTC en route to investors in that company—is truly to ignore economic reality.

Delaware's argument becomes most sterile when Delaware disputes the appropriateness of returning unclaimed interest payments on municipal obligations to the State of the municipality, contending that they should be paid

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dence that they are the beneficial owners of stocks registered in their names).

[29] If an intermediary can establish an ownership interest in a distribution it holds, that distribution obviously will not be unclaimed property. *Amici* assertions that they might actually own some of the property that passes through their hands (*see* SIA *Amici* Br. 21 n.14) are thus beside the point. Moreover, this possibility does not alter the fact that no intermediary was able to assert an ownership interest in any of the distributions that it turned over to New York. *See, e.g.*, Deposition Transcript of John Cirrito, Prudential-Bache Securities, Inc., 225-26 (July 26, 1990) ("Cirrito Dep.").

Delaware and New York do not dispute the fact that intermediary holders of unclaimed securities distributions claim no cognizable ownership interest in the property. Delaware merely provides a lengthy interpretation of the term "asset" (Br. 29-30); it does not contest the Special Master's conclusion that the possession of the unclaimed distributions "does not increase net worth" (*id.* 30 n.34). Although Delaware characterizes the Special Master's use of the term "asset" as a "fairly obvious factual error[]" (*id.* 30), Delaware did not devote even a sentence to this issue in its Comments on the draft Report (Aug. 13, 1991).

instead to a conduit intermediary's State. Delaware states matter-of-factly that it "hardly seems fair to reverse some of a debtor's obligations simply because a breakdown has occurred in the distribution chain." Del. Br. 50. This argument proves too much; every application of the backup rule returns funds to the State of the "debtor," thereby "reversing" (to use Delaware's term) the obligations. The argument also proves too little, because it does not address the central question: whether it is fairer to reward the State of the municipality whose activities and taxpayers have generated the funds or the State of the conduit intermediary that happens to be holding them, "simply because," in Delaware's own words, "a breakdown has occurred in the distribution chain." *Id.*

Fairness plainly favors the State of the municipality in such a contest. So, too, do other fundamental principles of equity. A reward to the State of the municipality results in a wide dispersal of unclaimed distributions among fifty States rather than disproportionately favoring either or both of the two States where the major intermediaries are either located or incorporated. A foundational principle of equity is that "equality is equity," meaning that rights "should be equalized among all the persons entitled to participate." 2 John N. Pomeroy, *Equity Jurisprudence* § 406, at 146 (1941). Since, in the absence of any federal priority rules, all fifty States have a right to enact legislation allowing them to retain unclaimed distributions created by issuers located in their States, *see generally Western Union Tel. Co.* v. *Pennsylvania; Standard Oil Co.* v. *New Jersey*, it follows that equity favors construing the *Texas* v. *New Jersey* rules of priority so as to equalize more closely these rights among all the States, rather than to concentrate the property in Delaware or New York. Such a construction also promotes the Court's objective in *Texas* v. *New Jersey* of promulgating a rule that "in the long run will be the most generally acceptable to all the States." 379 U.S. at 683.

Finally, the Master's fairness analysis also finds support in federal legislation enacted after *Texas* v. *New Jersey*. That legislation, codified in 12 U.S.C. §§ 2501-2503, took up the dissent's criticism in *Pennsylvania* v. *New York*, 407 U.S. at 216-22 (Powell, J., dissenting), that it was unfair to allow Western Union's State of incorporation to take custody under the backup rule even when the identities and addresses of both the senders and intended recipients of unclaimed money orders were unknown. Congress reversed this result in 1974, articulating a federal policy that gives priority in such cases to the fifty States where these transactions originate, *i.e.*, to the States where originators of funds place them in the stream of commerce. *See* 12 U.S.C. § 2501(3).

Delaware dismisses this statute on the ground that it specifically applies only to money orders and traveler's checks. Del. Br. 8. Delaware, however, ignores this Court's tradition of taking guidance in federal common law cases from federal statutes even when they do not speak directly to the question before the Court. The Court does so both to further "the interest in uniformity and because Congress' considered judgment has great force in its own right." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624-25 (1978); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313-17 (1981). The judge-made law of custodial priority should therefore not be oblivious to this congressional policy favoring dispersal to the States of the originators.[30]

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[30] The Delaware-New York suggestion that this Court should be guided by the Uniform Unclaimed Property Act of 1981 in interpreting federal laws and policies articulated by this Court and Congress is erroneous. Del. Br. 10, 32; N.Y. Br. 57-59. This Court specifically noted in *Pennsylvania* v. *New York* that its decree would prevail over any inconsistent provisions in the predecessor Revised Uniform Disposition of Unclaimed Property Act. 407 U.S. at 215 n.8. Moreover, the 1981 Act does not express a uniform state view concerning unclaimed securities distributions. Neither New York nor Delaware (nor more than twenty other States) have adopted the Act's provisions (N.Y. Br. 57 n.47), and there is no evidence

The Delaware-New York approach is inconsistent with all of these equitable considerations. In reality, it would have the Court disinter a philosophy buried in *Texas* v. *New Jersey*: the jurisdiction-based notion that priority should be given to the State where unclaimed funds are fortuitously "situated." [31]

2. *Escheat to the issuer's State is easier to administer*

The Special Master's interpretation of the backup rule is easier to administer because it is more certain. The Delaware-New York approach would require sending "courts (or Special Masters), in subsequent cases, in search of particular state law definitions of 'debtor' and

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that those States that did adopt its provisions (at least ten of which have since modified their escheat laws) considered intermediary-type securities transactions. For similar reasons, it also would be wrong to use, as Delaware suggests (Br. 10-11), a standard form contract of an unclaimed-property reporting service as a guide to this Court's intent in *Texas* v. *New Jersey*.

[31] Delaware's devotion to jurisdiction-based arguments is perhaps most evident in its "red-herring" contention (Report 70) that the Master's recommendation "appear[s] to go beyond the traditional limits of the Due Process Clause." Del. Br. 35. This is nonsense. As the Special Master's Report properly recognizes (at 68-70), Delaware's argument conflates choice-of-law and jurisdictional issues, applies to the primary rule as well as the backup rule, and ignores the fact that this Court specifically rejected a "minimum contacts" approach in *Texas* v. *New Jersey*, chastising Texas for confusing the issue of court jurisdiction with the issue of escheat priority. 379 U.S. at 678. Moreover, it has long been recognized that a State may bring suit in another State to enforce its federal escheat rights. *See, e.g., State* v. *Amsted Indus.*, 48 N.J. 544, 226 A.2d 715, 718 (1967) (States of creditors' last known addresses "could come to New Jersey where our courts would readily entertain actions by them based on their revenue claims against the defendant"); Brief of the Plaintiff-Intervenor States of Alabama, *et al.* in Opposition to the Motions of New York, *et al.*, at 10 n.14 (Dec. 18, 1990) (listing the statutes of twenty-nine States and the District of Columbia specifically authorizing their chief legal officers to bring actions on behalf of the unclaimed property administrators of other jurisdictions).

'creditor' (which may, in any case, vary somewhat from state to state and context to context)." Report 29-30. This approach, which is recommended by Delaware and New York almost entirely for its supposed simplicity, would in fact increase the complexity of the undertaking.

"Issuer" has a fixed, easily understood meaning. Identifying the "issuer" does not require courts to consult treatises and casebooks or to sift through ambiguous facts. "Debtor," on the other hand, is an often elusive and incomplete term, which requires the application of varying laws to sometimes uncertain facts. Moreover, the suggestion box would always be open: States would presumably remain free to propose differently shaded definitions of the term "debtor," which in turn would create precisely the sort of conflicts problems that this Court sought to avoid in *Texas* v. *New Jersey*, 379 U.S. at 678-80.[32]

The notion that state laws today definitively solve such problems is not correct. To begin with, the two principal sources cited by Delaware and New York to prove uniformity in state law definitions of "debtor" do not even mention the word. U.C.C. § 8-207(1) avoids the term, and merely speaks to the effect to be given to the issuer's or indenture trustee's treatment of the registered owner as the true owner.[33] The section has nothing to do with

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[32] New York's contention (Br. 65) that individuals would have a difficult time claiming their property from States under a State of the issuer rule has it backwards. A claimant will always know the issuer of the security on which the distribution was paid; however, the claimant is unlikely to know which intermediary in the chain of distribution was holding the payment when it became stuck en route to the claimant.

[33] Prior to due presentment for registration of transfer of a certificated security in registered form, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, to receive notifications, and otherwise to exercise all the rights and powers of an owner.

U.C.C. § 8-207(1).

the law of escheat. Moreover, like earlier "good faith" cases, this U.C.C. section only provides an affirmative defense to an issuer in a private action and, until that defense is raised in accordance with applicable procedural rules and established by evidence, the corporation remains a "debtor" in every sense of the word.[34] The Official Comment to U.C.C. § 8-207 in fact makes clear that the question of an issuer's "good faith" remains a litigable issue in such cases.[35] Thus, the U.C.C. does not eliminate fact-specific, case-by-case analysis of whether an issuer remains a "debtor" under state law.

As previously noted, neither Delaware nor New York has even adopted the provisions of the other source the two States cite, the Uniform Unclaimed Property Act of 1981. N.Y. Br. 57 n.47. It therefore ill suits them to argue that the Act's definitions should be given determinative effect here. In any case, the 1981 Act could not add content to the operative term "debtor" since it does not use the word. Section 1(8) of the Act defines "holder," and in terms that make being "indebted to another on an obligation" only one of three alternate ways to become a "holder."

As the Unclaimed Property Coordinator for the past nine years at a major brokerage firm testified, a State of the issuer rule "could be readily implemented." [36] Dis-

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[34] *See, e.g., New England Merchants Nat'l Bank* v. *Old Colony Trust Co.*, 385 Mass. 24, 429 N.E.2d 1143, 1145 (1982).

[35] The Official Comment provides: "The rule of such cases as Turnbull v. Longacre Bank, 249 N.Y. 159, 163 N.E. 135 (1928), which held the issuer liable for paying out dividends to the record holder after the transferee had given notice of the transfer and demanded that a new certificate be issued to him, is left unchanged." (*See* pages 22-23 above for discussion of the "good faith" defense under the common law.)

[36] *See* Affidavit of John Happersett (Dean Witter Reynolds Inc.) at 3, ¶ 6 (Jan. 3, 1991) ("Happersett Affidavit") (Exhibit 22 to the Reply Brief in Support of Motion for Partial Summary Judgment

covery has shown that intermediaries identify each distribution they receive on a particular security by the specific CUSIP number for that security.[37] Because CUSIP numbers "uniquely identify the issuer,"[38] compliance with the Special Master's recommendation would merely require that a firm's computer system link CUSIP numbers with the State of each issuer's principal executive offices. This information is contained in numerous databases commonly used throughout the industry. *See* Report 43 n.41, 66 n.58, B-24 (Metafact G).

Those intermediaries that attack the Special Master's Report in the SIA *Amici* Brief do not dispute the industry's ability to modify whatever software may be used in implementing the rule. Their protests, like New York's, instead amount to little more than the truism that it is simpler to remit unclaimed distributions to one State than to many States. *See* SIA *Amici* Br. 14-16,

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of the Plaintiff-Intervenor States of Alabama, *et al.* (Jan. 17, 1991) ("Reply Brief of Alabama, *et al.*")). Although Mr. Happersett attested to the ease of implementing a rule that looks to the State of incorporation of the issuer, his testimony applies equally to using the principal executive offices of the issuer to define its location. *See* discussion *infra* at 49-51.

[37] *See* Report B-14 (48); Deposition Transcript of Raymond DeCesare, DTC, 64, 146, 266-67 (May 15-16, 1990) ("DeCesare Dep."); Deposition Transcript of Robert Shearer, Merrill Lynch, Pierce, Fenner & Smith, Inc., 151 (July 19-20, 1990) ("Shearer Dep."); Deposition Transcript of Hugh Scott, Citibank, 151-52 (July 24, 1990) ("Scott Dep.").

[38] The CUSIP Directory (1990) at II (appended as Exhibit 18 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)). "CUSIP" stands for the Committee on Uniform Security Identification Procedures, a committee of the American Bankers Association, which is responsible for assigning a unique CUSIP number to each new security. Contrary to the impression created by the *amici* (SIA *Amici* Br. 17 n.11), it is a "very rare exception" for a security not to have a CUSIP number. Happersett Affidavit at 2, ¶ 4; The CUSIP Directory at V.

19-20; N.Y. Br. 67-69.[39] This fact, however, did not dissuade the Court from promulgating the primary rule of *Texas* v. *New Jersey*, which the Court described as "easy to apply" and which it believed would "simplif[y]" the "administration and application of escheat laws." 379 U.S. at 683, 681.[40] The brokerage firms, banks, and depositories that would be required under the Master's recommendation to report owner-unknown unclaimed distributions to the States of the issuers (rather than to New York or Delaware) have already been reporting under the primary rule, and presumably will continue to report, owner-known unclaimed distributions to all States of the last known addresses of the missing owners.[41]

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[39] New York's quotation (Br. 68) from the Affidavit of Louis LaRocca (Feb. 12, 1991) is unhelpful. As the Master found (Report 39-40 n.36), Mr. LaRocca failed to provide any basis in his affidavit for concluding that he has personal knowledge sufficient to support his assertions. Moreover, each of the six purported administrative problems with the State of the issuer rule that Mr. LaRocca lists boils down to the same truism—that it is simpler to remit unclaimed distributions to just one State. (*E.g.*, "Each firm would have to become familiar with fifty different laws * * *."; "Each firm would be subject to audit by fifty states * * *." *See* N.Y. Br. 68.)

[40] The State of New Jersey made an almost identical argument, which the Court rejected, in opposition to the Special Master's recommendation in that case. *See* Exceptions of the State of New Jersey to the Master's Report and Supporting Brief at 29 (Feb. 14, 1964). It is, of course, in the nature of the Court's priority rules that entities often must remit property to more than one State. The intermediary *amici* provide no justification for why they should be immune from these rules.

[41] *See, e.g.*, Shearer Dep. 357-58. Indeed, Delaware explains at great length why "the universe of securities and distributions escheatable under the primary rule far exceeds that involved in the present case and escheatable under the backup rule." Del. Br. 12-13 n.17. The concern of *amici* may ultimately have less to do with compliance questions than with their desire to continue to be able to strike deals with New York (or Delaware) so that they can retain

Nothing in the SIA *Amici* Brief undercuts the Master's recommendation.[42]

The Special Master aptly stated that, "in an industry that depends on computerization for its numerous transactions, it is difficult to believe that the administrative differences between [the] two possible approaches to the backup rule should drive the selection of the appropriate rule." Report 40 n.36. In 1991, almost 200 million shares of stock were traded daily on the New York Stock Exchange ("NYSE") alone.[43] The securities industry intermediaries spend billions of dollars annually on computers

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some of the owner-unknown distributions that they hold. *See* SIA *Amici* Br. 21 n.14.

[42] The entire administrative burden section of the SIA *Amici* Brief (pages 13-20) provides evidentiary support for only one proposition (*id.* 18, concerning information on computer databases). Typical examples of unsupported statements appear at 14 n.9 (comparing the ease of reporting under the primary and backup rules) and at 16 (each financial institution "conceivabl[y]" would have to report unclaimed property "continuously"). The *amici* also mischaracterize the Special Master's findings. The *amici* "question" the Master's supposed assumption that "each issue of securities is the subject of a separate suspense account." Br. 15 n.10. The Master's recommendation in no way relies on whether the unclaimed distributions are placed in one bank account or in many bank accounts. What matters is that each distribution, and hence the issuer, is identifiable by the unique CUSIP number of its underlying security.

The *amici* had every opportunity, moreover, to comment and develop a record on the feasibility of a State of the issuer rule before the Special Master. The *amici* were aware of this case from its outset; the Securities Industry Association filed an *amicus* brief on May 9, 1988; and counsel of record for SIA defended a deposition of one of the brokerage firms, while counsel for DTC on the SIA *Amici* Brief defended the deposition of DTC. Indeed, *amici*'s counsel of record and DTC's outside counsel were both on the Special Master's service list and were sent all communications by the Special Master, and all briefs of the parties, before the Master distributed his draft Report.

[43] *See* NYSE, *Fact Book For The Year 1991* 12 (1992).

in order to process successfully those transactions and to service and maintain the accounts of their millions of customers.[44] In addition, a number of unclaimed-property reporting services currently provide computerized assistance to aid companies with their state filings.[45] An industry better equipped to comply with the recommended rule can scarcely be imagined.

II. THE SPECIAL MASTER PROPERLY REJECTED NEW YORK'S PROPOSED DISTORTION OF THE PRIMARY RULE

While the "intermediary" theory of the backup rule asserted by Delaware and New York (but rejected by the Special Master) would permit New York to retain the unclaimed distributions it has seized from DTC and New York banks, that theory would not permit New York to retain unclaimed distributions from brokerage firms, because most of them are incorporated in Delaware. New

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[44] *See* "High Hopes, High Costs for Wall Street's High Technology," *The Economist* (Feb. 2, 1991) ("America's securities firms will spend $7.5 billion this year on technology"); U.S. Congress, Office of Technology Assessment, *Electronic Bulls and Bears: U.S. Securities Markets and Information Technology* 139 (1990) (brokerage firm annual expenditures on computers used for "information services is forecast to increase to about $3 billion by 1991"; "[t]here are thousands of commercial software packages available to brokers"). *See also* Happersett Affidavit at 4, ¶ 7 (Dean Witter Reynolds uses its "sophisticated computerized data-management capabilities" to process "tens of thousands of trades daily and keep[] track of the ever-changing portfolios of its nearly 2 million customers").

[45] All of these services—such as The Prudential Unclaimed Equities Division (a Prudential Insurance company), DISC APECS (a NYNEX company), the Clearinghouse Reporting Service, and the Unclaimed Property Clearinghouse—use sophisticated computer technology. *See* The Prudential Unclaimed Equities Division, *Introduction to Prudential's Abandoned Property Service*; "DiscAPECS Eases Compliance Woes," *Insurance Software Review* (April/May 1990); Clearinghouse Reporting Service, *Unclaimed Property Reporting Manual* 4, 9; Unclaimed Property Clearinghouse, *Voluntary Compliance Manual* (1992).

York has therefore conveniently developed a different theory, specific to brokerage firms. The Special Master, in rejecting this theory, characterized it as inconsistent with controlling precedent (Report 64), based upon "meretricious" factual assertions (*id.* 62 n.54), yielding "perverse[]" results (*id.* 65), and built upon "presumption on presumption with no legal or practical authority for either" (*id.* 67). This New York theory is also inconsistent with New York's other theory concerning DTC and banks, and is disputed by every other State including plaintiff Delaware.

The centerpiece of New York's brokerage firm theory is that, while unclaimed distributions that become "stuck" at DTC and banks are owner-*unknown*, the distributions that become "stuck" at brokerage firms are owner-*known* and are therefore subject to escheat under *Texas* v. *New Jersey*'s primary rule rather than its backup rule. The Special Master correctly rejected this contention as contradicting "the unanimous conclusion of the industry entities and personnel from whom discovery was taken that the unclaimed funds at issue here are net of all successful efforts to identify appropriate recipients and are truly owner-unknown." Report 61.[46]

New York's assertion that broker-held distributions are owner-known is a *post hoc* effort to justify the State's taking of unclaimed distributions pursuant to a statute that conflicts with the rules of priority established in *Texas* v. *New Jersey*. New York has taken custody of such distributions under Article V-A of its Abandoned Property Law ("APL"), enacted in 1952, which authorizes New York to seize unclaimed distributions from brokerage firms solely because that property was "re-

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[46] *See also* Shearer Dep. 213-15 (Merrill Lynch's records do not contain the identity or address of the owners of the unclaimed distributions), *id.* 348-49; Deposition Transcript of Joseph Principe, John Hancock Clearing Corp. (formerly of Tucker Anthony Inc.), 102-03, 222 (July 25, 1990) ("Principe Dep."); Cirrito Dep. 93, 128.

ceived in" New York, irrespective of the last known addresses of the owners (or the domiciles of the "debtors"). APL §§ 511(1), 511 (1-a). New York's current theory that it is entitled to this property under the primary rule as the domiciliary State of the persons to whom the distributions are owed is thus a recent—and, we show below, meritless—invention.[47]

A. All Evidence Demonstrates That The Unclaimed Distributions Held By Brokerage Firms Are Owner-Unknown

Although New York now asserts that the unclaimed distributions held by brokers are owner-known, prior to this litigation New York publicly acknowledged that these distributions are in fact owner-unknown. In 1980, for example, New York instituted proceedings against the brokerage firm of Paine Webber, after Paine Webber had refused to turn its unclaimed distributions over to New York.[48] New York stipulated in that proceeding that

> [t]he books and records maintained by Paine Webber do not reveal the identity of, or any last known addresses for, any persons to whom [unclaimed] dividends, interest or cash may be owed, nor do such books and records reveal whether Paine Webber is the owner of such property.[49]

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[47] Nothing more clearly demonstrates the *post hoc* nature of New York's primary rule theory than the fact that it now requests discovery in order to prove that it was entitled to the unclaimed distributions that it seized from brokerage firms in years past. *See* N.Y. Br. 81.

[48] *See In The Matter Of The Application Of The Office Of The State Comptroller, Petitioner, For A Certification That Certain Property Held By Paine Webber Jackson & Curtis, Incorporated, Respondent, Be Deemed Abandoned Property* (Office of the State Comptroller) (*"Paine Webber"*).

[49] Stipulation of Agreed Facts ¶ 7, *Paine Webber* (appended as Exhibit 8 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)).

Moreover, New York's argument flies in the face of New York's own characterization of such property in the same fashion in its 1988 edition of its *Handbook for Reporters of Unclaimed Funds*—prepared by the New York Office of Unclaimed Funds to "inform organizations of their responsibilities under the Abandoned Property Law." The *Handbook* states that "[u]nclaimed amounts received in this state and securities held in this state for unknown parties or addressee unknown are subject to Article V-A of the New York State Abandoned Property Law." [50]

The record, in any event, conclusively demonstrates that this property is owner-unknown. As New York acknowledges,[51] the brokerage firms uniformly testified that they do not know the owners of the distributions that they remit to New York. The sole "evidence" on which New York relies to counter that testimony is the affidavit of its own Director of Audits, Robert Griffin ("Griffin Affidavit").[52] That affidavit, however, is irrelevant, for all that it purports to show is that through monumental effort and expense (which even New York concedes would

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[50] The quoted passages appeared at pages 1 and 40, respectively, of the *Handbook* (appended as Exhibit 10 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)). Language to the same effect appeared in the 1983 edition of New York's *Handbook* (appended as Exhibit C to Delaware's Complaint). Thus, regarding APL § 511, the 1983 *Handbook* stated that

> unpaid amounts in category (a) often occur when the broker or dealer ceases to hold the security at the time of receipt of the dividend or bond interest, the security having already been traded, and *the persons or customers entitled to such payment cannot be identified (unknown).*

Complaint of Delaware, Ex. C at 71, ¶ 1 (Feb. 8, 1988) (emphasis added).

[51] Brief in Opposition to Motions of the Plaintiff-Intervenor States at 59 (Dec. 18, 1990); N.Y. Br. 33.

[52] New York appended this affidavit as Exhibit A to its Brief in Opposition to [Delaware's] Motion for Leave to File Complaint (May 9, 1988) ("N.Y. Brief in Opposition").

be infeasible (N.Y. Br. 80)), a so-called "debtor broker" could, but only sometimes (*see* Griffin Affidavit ¶ 2), identify the broker (the so-called "creditor broker") to which it delivered a particular securities certificate that was not subsequently reregistered out of the "debtor broker's" name and that allegedly resulted in a distribution overage through the phenomenon of "nominee float." [53] Even if New York could accomplish this unaccomplishable task, the fruits of its efforts would reveal nothing about who actually owns that unclaimed distribution.[54]

The person or entity that is owed a distribution is the beneficial owner, on the record date, of the security on which the distribution is paid. New York has never claimed that "creditor brokers" own or even hold the relevant certificates over the record date. Indeed, New York has conceded that it has no way of knowing whether the first recipient of the certificate—the only party New York says it can identify (albeit theoretically)— actually held that certificate over the record date or is the owner of

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[53] Griffin Affidavit ¶2; N.Y. Brief in Opposition at 6-7 (May 9, 1988). "Nominee float" occurs when a broker (Broker A) delivers to another party a certificate that is still registered in Broker A's street name. If the recipient of the certificate (or the person to whom the recipient subsequently transfers the certificate) does not reregister the certificate out of Broker A's name by the record date for a distribution, Broker A will receive the distribution even though it no longer holds the security and does not anticipate receiving the distribution. New York has labeled Broker A the "debtor broker," and dubbed the recipient of the certificate from Broker A, when it is a broker, the "creditor broker."

[54] New York's request that it be allowed to use "statistical sampling" (Br. 80) to determine "creditor brokers' " so-called "trading addresses" is also unavailing because, as we explain below, and as the Master recognized (Report 61-67), the identities of the "creditor brokers" are irrelevant and these addresses are meaningless. Moreover, the Special Master correctly rejected a "sampling" approach as inconsistent with this Court's escheat decisions. *Id.* 59 n.50.

any distribution paid on the certificate.[55] Identifying the first recipient broker (the so-called "creditor broker") in what may be a series of subsequent exchanges of the certificate therefore does not establish that any particular distribution is owner-known.

This fact is underscored by New York's admission that unclaimed distributions caused by "float" and held by DTC and custodian banks are owner-unknown. N.Y. Br. 18, 81. DTC and custodian banks, like brokers, know to whom they have delivered out certificates registered in their names (DeCesare Dep. 351; Scott Dep. 70-72), but they do not know the owners of the certificates as of any subsequent record date for a distribution (DeCesare Dep. 116-18; Scott Dep. 207-08). Consequently, neither the intermediary brokers, banks, nor DTC can identify the actual owners of the distributions.

New York responds by attacking the Special Master's conclusion that the "creditor" of an unclaimed securities distribution is its ultimate intended beneficiary. N.Y. Br. 75-77. According to New York, "creditor" in the case of distributions held by brokers means the "apparent owner" of the property, which New York defines as the next intermediary in the chain of distribution (*i.e.*, the only entity that New York claims can be identified, at least theoretically). Yet, just as New York concedes that the first recipients of certificates from DTC and custodian banks are not the "apparent owners"—because they do not necessarily hold the certificates over the record dates

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[55] In New York's own words:

> The broker to whom delivery was initially made [the so-called "creditor broker"] may have a pre-record date sale in the same security and use the certificate it received from the debtor broker, without re-registering it, to effect delivery to the contraparty to its sale.

Renewed Motion for Judgment on the Pleadings Against the Plaintiff-Intervenor States at 47 n.85 (Oct. 30, 1990) (deposition references omitted); *see also* Shearer Dep. 103 ("the person who [Merrill Lynch] first delivered [the certificates] to could transfer and deliver them down a chain of other people").

—identifying the first recipient of a certificate from a brokerage firm likewise fails to establish the necessary ownership interest.[56]

Furthermore, New York's assertion that broker-held unclaimed distributions are owed to "creditor brokers" is inconsistent with how the SEC requires that such distributions be treated. In 1972, the SEC promulgated Rule 15c3-3, which requires brokerage firms to maintain a separate bank account, called the Special Reserve Bank Account for the Exclusive Benefit of Customers ("Reserve Account"). *See* 17 C.F.R. § 240.15c3-3(e)(1).[57] This rule demands that, among other funds, unclaimed dividends and interest held by brokerage firms be credited to this special account.[58] John Cirrito, Senior Vice President of

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[56] New York further asserts that the Special Master "interprets the primary rule in such a way that it cannot be utilized." N.Y. Br. 78. This is plainly not the case. For example, the brokerage firms testified that when they send dividend checks to a customer and those checks are not received or cashed by the customer, the monies are placed in a dormant customer account and eventually turned over to the State of the customer's last known address under the primary rule. *See, e.g.*, Shearer Dep. 357-58; *see also* Del. Br. 12-13 n.17 (discussing Delaware's contention that far more distributions are escheatable under the primary rule). The fact that the Special Master's recommendation would result in the primary rule's not being applied to the distributions at issue in this case merely reflects the fact that this case involves only those distributions that are owner-unknown.

[57] "Customer" is defined in the rule to exclude brokers trading on their own behalf. 17 C.F.R. § 240.15c3-3(a)(1).

[58] Rule 15c3-3 contains a formula that delineates the various types of funds that must be credited to the Reserve Account. 17 C.F.R. § 240.15c3-3a, Exhibit A. Item 8 of that formula credits into the Account the "[m]arket value of * * * credits * * * in all suspense accounts over 30 calendar days." Through communications with the SEC, the NYSE confirmed that unclaimed dividends and interest are "suspense accounts" to be credited to the Reserve Account pursuant to Item 8, and directed its member brokerage firms accordingly. *See* NYSE, ***Interpretation Handbook***, Vol. 1 at 640,

Prudential-Bache, confirmed that Prudential-Bache places unclaimed distributions in its Reserve Account for customers pursuant to Rule 15c3-3, and that these monies may be owed not only to Prudential-Bache's own customers but also to customers of other firms. Cirrito Dep. 78-80, 153-55.[59]

B. New York's Assertion Regarding The Cause Of Overages At Brokerage Firms Is Unsupported By The Record

Even if the identities and addresses of so-called "creditor brokers" were relevant—which they are not—New York's primary rule theory would still fail because it depends upon the unwarranted presumption that unclaimed dis-

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¶ 3 (1986) (appended as Exhibit 23 to Reply Brief of Alabama, *et al.* (Jan. 17, 1991)).

Delaware's discussion of Rule 15c3-3 (Br. 44-45) misses the point. We do not rely upon this rule with respect to Delaware's theory, and no one contends that brokers holding unclaimed distributions may not make certain uses of those monies prior to escheat. Rule 15c3-3 is relevant, however, insofar as it refutes New York's assertion that those distributions are not customer monies. Delaware does not dispute that the Rule so treats those distributions (and in fact agrees that they are owner-*unknown*).

[59] Since the addresses of the so-called "creditor brokers" are irrelevant, the Master's denial of New York's request for additional discovery on the issue—"to demonstrate that it is the State of last known address of virtually all of the creditor brokers on the books and records of New York debtor brokers" (N.Y. Br. 81)—was also clearly appropriate. Moreover, New York was present at each of the brokerage firm depositions, yet never asked a single question to challenge, explore, or impeach the testimony that the property is owner-unknown. Indeed, New York did not pose a single question pertaining to the brokers' recordkeeping practices in this regard. Nor did New York ask whether any type of examination of those records would permit identification of the so-called "creditor brokers." For example, New York did not challenge or probe the statement of John Cirrito that "any kind of research" into overpayments "would really be fruitless." Cirrito Dep. 73. At two of the three brokerage firm depositions, New York in fact asked no questions at all.

tributions held by brokerage firms arise only from "nominee float," rather than from other causes, such as errors, as to which not even New York contends it can identify a "creditor broker." N.Y. Br. 19-20, 30, 77. The unanimous testimony of the brokerage firm representatives contradicts this presumption. These representatives testified that (1) errors (as well as out-of-balance conditions and missed transfers) are among the causes of unclaimed distributions that they hold,[60] and (2) brokers have no idea of the particular causes of all or any portion of the unclaimed distributions that they turn over to New York.[61] An overage is thus a gross, indivisible whole, whose component parts remain unknown.

New York responds by claiming that overages caused by errors and out-of-balance conditions are resolved, and therefore do not result in unclaimed distributions. N.Y. Br. 29, 30. New York, however, provides no record citation for most of its assertions; for others, it relies on testimony that in no way supports them. New York particularly relies on the testimony of Robert Shearer of Merrill Lynch, but Mr. Shearer never testified that overages caused by factors other than "nominee float" are resolved prior to escheat. To the contrary, he testified that Merrill Lynch "can't determine whether any portion of" the unclaimed distributions that the firm turns over to New York "was the result of an error or the result of physical certificates having been withdrawn from Merrill Lynch but still registered to Merrill Lynch ["nominee float"]." Shearer Dep. 198.[62] New York's other at-

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[60] Shearer Dep. 193-94; Cirrito Dep. 224; Principe Dep. 97-98.

[61] Shearer Dep. 195, 197-98; Cirrito Dep. 224-25; Principe Dep. 96, 101.

[62] This is typical of New York's playing fast and loose with the record. New York erroneously accuses the Special Master of having misconstrued the causes of unclaimed distributions at the brokerage firm level (*e.g.*, Br. 19-20) when, as shown above, it is New York's factual assertions that are unsupported and indeed

tempts to show that unclaimed distributions held by brokerage firms are almost never caused by error or are not owed to the customers of brokerage firms amount to sheer speculation.[63]

Finally, New York's assertion (Br. 21, 79 n.58) that 97.4 percent of the claims on escheated distributions that New York paid from 1985 through 1989 have been paid

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contradicted by the record. New York's treatment of the causes of unclaimed distributions at the DTC and custodian bank levels suffers from the same infirmities. New York criticizes (*id.* 24 n.25, 27) the Special Master's finding that "float" is only one of several causes of such unclaimed property, notwithstanding the fact that those intermediaries testified that there are many causes of unclaimed distributions besides "float" (DeCesare Dep. 90-91, 120-21, 138; Scott Dep. 166-67, 174-75), and that the intermediaries do not know the causes of all or any portion of a particular distribution that they turn over to New York (DeCesare Dep. 119, 131).

[63] New York argues, for example, that customers "usually" receive the distributions to which they are entitled from their brokers. Responses of the State of New York to the First Set of Interrogatories Propounded by the States of Alabama, *et al.*, No. 12 (April 27, 1990) ("N.Y. Resp."); N.Y. Br. 79 n.58. Even if this were the case, it would not explain the cause of unclaimed distributions held by brokerage firms. "The percentage of funds that appears to become 'lost' in the system has been estimated by some of the parties as approximately 0.02%, or two ten-thousandths, of the entire amount distributed." Report 10 n.9. New York offers no evidence that any particular instance in which funds become stuck at a brokerage firm fails to correspond to one of the instances in which a customer is not paid. *See, e.g.*, Affidavit of William H. Mills, Sr. ("Mills Affidavit") (appended as Exhibit 5 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)). Mr. Mills was a customer of Merrill Lynch, and dividends on the securities that he beneficially owned were supposed to be credited by the firm to his account. Nevertheless, Merrill Lynch for several years failed to credit his account with certain dividends paid on his stock and turned the dividends over to New York as unclaimed property. Mr. Mills's claim file was produced by New York in discovery as "representative." *See* Letter from O. Peter Sherwood to David A. Talbot, Jr. (June 6, 1990) (appended as Exhibit 16 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)).

to brokers and financial institutions, such as DTC and banks, proves nothing. Brokerage firms frequently make claims on behalf of their customers,[64] and an intermediary's claim does not reflect whether it was filed on behalf of a customer.[65] Intermediaries also routinely monitor and research their underpayments and pursue claims to recover distributions they did not receive.[66] By contrast, a customer may never know that a dividend was declared (*see* Shearer Dep. 113) or that it erroneously was not credited to his or her account, or may not learn of what actually happened until years have passed and the property has been escheated.[67]

C. "Trading Address" Is A Contrived Term, Created By New York For Purposes Of This Litigation

New York's entire primary rule argument devolves to a request that this Court adopt a series of presumptions that, when linked together, purport to show that unclaimed distributions held by brokerage firms are owed to other brokerage firms, most of which have "trading addresses" in New York. Apart from the invalidity of the other presumptions upon which New York's theory rests, the concept of "trading addresses" is itself an artifice "created out of whole cloth by New York, to favor itself in the instant case—or, perhaps more accurately, to rationalize post-hoc what it has been doing for many years." Report 67 n.59.

The Special Master correctly found that "trading address" "is not a concept used in securities law, the Uniform Commercial Code, debtor-creditor law, or the law of personal jurisdiction, venue, or subject matter jurisdiction of the courts." *Id.* New York now asserts (Br.

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[64] Principe Dep. 106.

[65] Shearer Dep. 225-26, 276; Cirrito Dep. 237.

[66] Principe Dep. 113; Cirrito Dep. 72.

[67] *See, e.g.*, Mills Affidavit.

80 n.59) that "trading address" is the "official address" used by the National Securities Clearing Corporation ("NSCC"); initially, New York argued that "trading address" could be found in the Securities Industry Association's *Securities Industry Yearbook 1987-88* and *The E-Z Telephone Directory of Brokers and Banks* (1986).[68] This moving-target definition of "trading address" is typical of the way New York has tried to defend the indefensible. There is no evidence that the NSCC even denotes an "official address," much less that the data of such a private organization should be entitled to legal significance.

Indeed, even if New York could unravel the identity of the owners of the unclaimed distributions held by brokerage firms, New York would be obligated to forward the property to those owners and there would be no unclaimed distributions for any State to take. In reality, of course, the property is owner-unknown. As stated by John Cirrito, Senior Vice President of Prudential-Bache, "[t]he problem with overages is that you don't have—you don't agree or don't know to whom the monies are due. If you did, you would pay them." Cirrito Dep. 128.

III. THE COURT SHOULD ADOPT THE SPECIAL MASTER'S SEPARATE RECOMMENDATION THAT FOR PURPOSES OF THE BACKUP RULE THE LOCATION OF AN ISSUER SHOULD BE DEFINED AS THE STATE IN WHICH IT MAINTAINS ITS PRINCIPAL EXECUTIVE OFFICES

The Special Master has separately recommended "that the location for purposes of the backup rule be determined by looking to where the issuer's principal executive offices are located," rather than to its place of incorporation. Report 56. The Report concludes that the administrative concerns that constrained the Court to reject a subjective "principal place of business" approach in *Texas*

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[68] *See* N.Y. Brief in Opposition at 8 n.9 (May 9, 1988).

v. *New Jersey* do not apply today to an objective "principal executive offices" standard. *Id.* 41-50. The Master further found that today "it would be quite unfair" to allocate disproportionately the huge amount of unclaimed securities distributions to one State, "when the principal executive office test could provide a much superior allocation among the jurisdictions with roughly comparable ease and certainty." *Id.* 47.

The technological advances of the past twenty-seven years, which make readily available through computer databases the "principal executive offices" information provided on required SEC filings, and the dramatic increase in unclaimed securities distributions subject to the backup rule, both support the conclusion that today, as a definition of an issuer's location, "principal executive offices" "is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." 379 U.S. at 683.

All fifty States are before the Court, and only Delaware, the State of incorporation of more than 40 percent of the companies listed on the New York Stock Exchange (Report 47 n.43), opposes this aspect of the Master's recommendation. Delaware argues that (1) it is not necessarily more equitable to prefer the State where an issuer maintains its principal executive offices over the State of its incorporation; (2) a "principal executive offices" definition would be administratively burdensome to implement; and (3) the principle of *stare decisis* requires that the old proxy for an issuer's location be maintained, even if the foundation for it no longer exists. Del. Br. 52-76. We discuss each of these objections in turn.

A. It Is Far More Equitable To Define The Location Of An Issuer As The State In Which It Maintains Its Principal Executive Offices

The Special Master's analysis of the equities is rooted in this Court's own description of State of incorporation as "a minor factor" to be considered, and in the Court's

recognition that, where feasible, it is most equitable to reward the State that, because it is where the issuer maintains its main offices, "is probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." *Texas* v. *New Jersey*, 379 U.S. at 680. Delaware ignores these underpinnings of the Special Master's reasoning, and goes so far as to accuse the Master of recommending a Marxist redistribution of income. Del. Br. 68.

The demographics of Delaware itself, however, well illustrate the soundness of this Court's view of a company's State of incorporation as a minor factor in a fairness analysis. Delaware is the State of incorporation of more than 40 percent of NYSE-listed companies, but only a small fraction of the business activities in this country—the activities generating the unclaimed distributions—occurs in Delaware. Report 47 n.43. Continued application of the old proxy for an issuer's location would thus yield vast quantities of unclaimed distributions to a single State in which only limited business activities take place.[69]

Delaware says it is nonetheless entitled to custody of the unclaimed distributions as a reward for the "great effort" and "resources" it devotes to the interests of Delaware-incorporated businesses. *See* Del. Br. 68-69 (discussing, *inter alia*, the time spent by Delaware public servants scrutinizing the State's corporate laws and handling trials involving Delaware-incorporated companies). These costs, of course, are dwarfed by the massive taxes Delaware recovers from these companies annually;[70] and

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[69] Whether certain commentators believe that Delaware's corporate laws assist in maximizing shareholders' revenue (Del. Br. 62-64) does not change this fact.

[70] In 1990, Delaware expected to receive $201 million in franchise taxes alone. 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* F-2

"tax revenues are only the tip of the iceberg," for they do not include the substantial additional income Delaware residents earn from servicing Delaware corporations.[71]

Delaware does not deny that defining the location of an issuer as the State in which it maintains its principal executive offices rather than its State of incorporation is more likely to result in a return of funds to the jurisdictions where those funds were created. Delaware's complaint rather appears to be that "principal executive offices" is not as equitable a definition as "principal place of business." *See* Del. Br. 64-65. This argument merely criticizes the Special Master for not having recommended a definition that Delaware could have attacked with some merit[72]—a definition Delaware itself describes as "unadministrable." *Id.* 65. The Master recognized, moreover, that a company's principal executive offices will not always be the same as its principal place of business, but nonetheless "will, in almost every case, involve substantial operations (in the sense of executive decisionmaking, which is of critical importance to the day-to-day life of a business)," and, "usually, albeit not always, will be located at a firm's principal place of business, particularly as one focuses on relatively small companies." Report 46. "This is more than can be said about the location of incorporation as compared to the location of a business' operations." *Id.*

(2d ed. 1991 Supp.); *see also* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. Econ. & Organization 225, 240-42 (Fall 1985) (*cited in* Del. Br. 62-63) (showing that Delaware's franchise revenue averaged in excess of 15 percent of its total revenue from 1960 to 1981, and that this income is considerably greater than Delaware's costs in chartering corporations).

[71] Roberta Romano, *supra* note 70, at 240-41.

[72] This Court eschewed a "principal place of business" approach in *Texas* v. *New Jersey*, despite its equitable advantages, because, unlike a "principal executive offices" approach, it is inherently subjective and would have generated a multitude of fact-specific, case-by-case analyses. 379 U.S. at 680.

Finally, Delaware argues that companies may choose the location of their principal executive offices for whimsical reasons. Del. Br. 66-67. This contention is grossly exaggerated,[73] but in any case beside the point. This Court's fairness criteria focus on the location of the companies that generate the unclaimed distributions, not on the reasons underlying those companies' decisions to locate there.

B. A "Principal Executive Offices" Definition Can Be Readily Implemented

We have previously explained that it would be administratively simple for an intermediary to identify the States of issuers. *See supra* pp. 30-34. The Special Master correctly concluded that there would be no substantial difference in this regard whether the location of the issuer is defined as the State of its principal executive offices or of its incorporation. Report 46. The Special Master crafted his recommendation to ensure its implementation with little difficulty by grounding it in public companies' own designations of their principal executive offices in public filings with the SEC (*id.* 42-49), thereby creating as objective a standard as that of State of incorporation.

The cover pages of numerous registration statements and reporting forms that registered issuers must file with the SEC under the Securities Act of 1933 and the Securities Exchange Act of 1934 require each filing company to state the address of its "principal executive offices." *See* Report B-24 (Metafact H). Under the Master's recommendation, the location of the principal executive offices

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[73] One of the articles Delaware itself cites for this proposition describes numerous economic factors justifying relocation decisions—including the availability of skilled labor, real estate and rental costs, operating costs, taxes, environmental regulations, corporate identity, the ability to meet strategic goals, and proximity to large metropolitan centers. *See* W. John Moore, "Corporate Kidnapping," 19 *National Law Journal* 1518, 1519 (June 13, 1987) (*cited in* Del. Br. 67).

identified by each company on these forms is binding for purposes of implementing the backup rule.[74] Since holders of unclaimed property can now access this information in the same manner as they would access issuers' States of incorporation, *i.e.*, through computer databases used throughout the securities industry,[75] holders can comply easily with the Master's recommendation.

Delaware devotes much of its self-serving critique of the feasibility of the Master's proposal to an analysis of how filings under the U.C.C. operate. Del. Br. 56-58. This discussion is irrelevant, however, to the ease with which a rule that utilizes one standard source—SEC filings—can be implemented. Moreover, the supposed practical problems that Delaware suggests might arise under the Master's recommendations do not withstand scrutiny. Delaware asserts (Br. 59) that in a few instances different computer databases list different principal executive offices for a company, *i.e.*, where one database has not been updated as quickly as another.[76]

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[74] No one disputes that the location of the principal executive offices of every issuer is available. Indeed, even when an issuer is exempt from filing under the 1933 and 1934 Acts, a standard source for determining its principal executive offices still exists. Pursuant to 17 C.F.R. § 240.15c2-11 and Schedule H of the National Association of Securities Dealers ("NASD") By-Laws, NASD requires brokers and dealers to file NASD Form 211 with respect to those categories of issuers. As with 1933 Act registration statements and 1934 Act reports, NASD Form 211 requires the identification of the address of the issuer's "principal executive offices."

[75] *See* Report 66 n.58 (citing Brief in Support of Alabama, *et al.* Exs. 19 & 20; Principe Dep. 69-72); *see also* Shearer Dep. 375-78. These databases identify both the State of incorporation and the principal executive offices of each company as reflected in its SEC filings. *See, e.g.*, Dialog Information Retrieval Service, *Disclosure Database* 1 (1989), and Dialog Information Retrieval Service, *Standard & Poor's Corporate Descriptions* 1 (1988) (sources of information identified as documents filed with the SEC).

[76] The Master's proposed decree refers with precision to the State of the issuer's principal executive offices as identified by the

If a holder relies in good faith upon information contained in a database when remitting unclaimed property to a State, however, the holder is relieved of liability to any other State that subsequently believes that it should have received the property.[77] Moreover, no litigable issue between States would be created in these rare instances since it is the information on the SEC forms that is determinative.[78]

C. Adopting The Master's Proposed Definition Would Be An Appropriate Exercise Of This Court's Power

Delaware maintains that modifying the backup rule's locational definition would violate the principle of *stare decisis*. "It has been said so often as to have become axio-

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issuer "on the last report filed in the twelve-month period immediately prior to the distribution in question." Report A-4 (Proposed Decree, ¶ 6). This location obviously does not change. The SIA *Amici* raise the specter (Br. 17) of "issuers list[ing] more than one principal executive office." This is a non-issue. Only four of the approximately 1,700 NYSE companies listed more than one principal executive office on recent quarterly Forms 10-Q filed by them with the SEC, one more than the three NYSE companies that identified themselves as being incorporated in more than one State. Report 47-48.

[77] Every state unclaimed property statute relieves holders of unclaimed property from all liability for any claim made for the property, once the property is delivered to the State. *See, e.g.*, Ala. Code § 35-12-34 (1975); Del. Code Ann. tit. 12, § 1203(c) (1987).

[78] Delaware's complaint (Br. 22 & n.32) that the Special Master erroneously rejected its request for discovery with respect to the modification of the locational definition is baseless. The Master permitted two additional rounds of briefing on this issue (as well as on the issue of retroactivity) in response to Delaware's request. Delaware's opening brief contained twenty-one exhibits and an affidavit to which six more exhibits (totalling in excess of 120 pages) were appended. These materials did not create any justification for additional discovery, which the Master correctly concluded would have been "pointless." Discovery Order No. 15 at 1 (Jan. 28, 1992).

matic," however, "that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States*, 290 U.S. 371, 383 (1933); *see, e.g.*, *Trammel* v. *United States*, 445 U.S. 40, 47-53 (1980) (modifying common law rule concerning adverse spousal testimony). Because of the availability today of computer databases reflecting the information provided on standardized SEC forms, "principal executive offices" now possesses the same "virtues of clarity and ease of application" that led this Court in *Texas* v. *New Jersey*, 379 U.S. at 680, to adopt State of incorporation as a proxy for location in lieu of the unclear and subjective "principal place of business." Since the "State of incorporation" proxy now operates in "quite unfair" ways (Report 47) as compared to a "principal executive offices" definition, refining the Court's common law escheat rules to take these developments into account would plainly be an appropriate exercise of this Court's power.[79]

Delaware's argument that reliance interests would be upset is meritless. Delaware can point to no private reliance interests that would be affected, and cites only one public interest—the fact that a change in the locational proxy might require States to amend their statutes. Del. Br. 73-74. Delaware, the only State that opposes the modification, is in no position to assert this "reliance interest" on behalf of the other forty-nine States. To the extent that any States might have to amend their unclaimed property statutes, this is a consequence that those States, through the position they have taken in this case, are ob-

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[79] As this Court recognized in *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 174-75 (1989), *stare decisis* does not protect a rule that has "become[] outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" (quoting *Runyon* v. *McCrary*, 427 U.S. 160, 191 (1976), quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

viously prepared to accept.[80] The doctrine of *stare decisis*, in short, does not straight-jacket this Court from making a "minor change" (Report 50) in the backup rule to ensure that the rule today furthers the policy objectives of *Texas* v. *New Jersey*.[81]

IV. THE SPECIAL MASTER'S RECOMMENDATIONS SHOULD BE APPLIED TO ALL FUNDS WRONGFULLY SEIZED BY NEW YORK

The Special Master further recommends that the decision in this case apply to the full complement of unclaimed distributions wrongfully seized by New York, *i.e.*, to the distributions New York has taken from brokerage firms (the seizure of which New York now defends under the primary rule) and from DTC and banks (now defended under the backup rule). Even if applying the present decision to these funds, all of which New York

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[80] Delaware raises a concern as to whether the modified locational definition would apply to property other than securities distributions. Del. Br. 60-61. If this definition did so apply, it would not create any difficulties. Delaware provides no examples of owner-unknown property, other than securities distributions, that is held by an intermediary where the originator is known. In situations where the holder is also the originator or is the only known party to the transaction (as in *Pennsylvania* v. *New York*), implementation of a "principal executive offices" definition would be simple. The State of the holder would be entitled to custody of the property, and the holder would surely know the State of its own principal executive offices.

[81] The fact that Congress has not made such a modification in the case of securities distributions does not alter this conclusion. In *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970), this Court reaffirmed the appropriateness of modifying its common law rules despite congressional inaction: "To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'" (Citation omitted.) Moreover, the statute that Congress has enacted affecting the States' powers

concedes it currently holds only as custodian,[82] were deemed to raise a retroactivity question, the accepted principles concerning retroactive application would still preclude Delaware's and New York's objections to the Master's recommendation.[83]

The two dispositive principles are that (1) if the court decision is not fundamentally law-changing (either as a matter of "first impression" or as a break from "clear past precedent"), it applies retroactively, *Ashland Oil, Inc.* v. *Caryl*, 110 S. Ct. 3202, 3204-05 (1990) (per curiam) (applying the first (threshold) prong of the test in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971)); *American Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 196 (1990), and (2) even if the decision is fundamentally law-changing, the party seeking to defeat retroactivity must demonstrate that it relied to its detriment on the earlier law, *Chevron Oil*, 404 U.S. at 106; *Ashland Oil*, 110 S. Ct. at 3204-05.

Applying this Court's federal escheat rules to the property New York has seized from brokerage firms is so obviously appropriate that it merits little discussion. The Special Master's rejection of New York's contrived primary rule theory obviously overrules no past precedent; it is in fact compelled by the controlling case law. *See, e.g.*, Report 64, 65, 67. That ends the matter. New York, however, does not lose out entirely; it will be able to re-

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in this regard, 12 U.S.C. §§ 2501-2503, rejects using a company's State of incorporation as a proxy for the company's location. The federal statutes listed by Delaware (Br. 71-72 n.85) merely expand the types of unclaimed property that the federal government has chosen to escheat; they do not address the common law rules of escheat priority established in *Texas* v. *New Jersey*.

[82] *See infra* note 86.

[83] We see no need to respond to New York's separate argument, made in passing without case or statutory support, that there should be some statute of limitations or laches bar in this case. *See* N.Y. Br. 92. The Special Master has adequately discussed the flaws in this contention, with case and statutory support. Report 74-76.

tain all distributions taken from brokerage firms to which it is entitled under the backup rule as the State of the issuer.

The Special Master's recommendation that the backup rule should apply to the funds New York has taken from DTC and banks is also clearly correct. The choice of the State of the issuer over the State of the intermediary under the backup rule is grounded in this Court's earlier decisions. The Master's "teas[ing] out" of what he termed an "ambiguity" in the backup rule of *Texas* v. *New Jersey* to reach this result hardly constitutes fundamental law-changing activity. Report 73. *See generally Ashland Oil*, 110 S. Ct. at 3204-05; *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2448 (1991) (White, J., concurring) (a "reasonably foreseeable" decision does not rise to the level of a "new rule" under *Chevron Oil*).

The only real question is whether the Master's proposed departure from the locational definition used in *Texas* v. *New Jersey*—looking to the State where an issuer maintains its principal executive offices rather than to its State of incorporation—provides a reason to resist full application of this aspect of the recommended rule to the DTC and bank funds. Again, we believe the Master gave the correct answer because New York has not demonstrated that it relied upon the *Texas* v. *New Jersey* locational definition in taking these distributions.

New York took distributions from DTC and custodian banks under a clearly overbroad, pre-*Texas* v. *New Jersey* statute that purports to reach all unclaimed intangible property "held or owing" in New York. APL § 300 (1)(e). Indeed, the APL covers property, including owner-unknown distributions, held by banks organized under the laws of States other than New York. APL § 300(4). These seizures were thus scarcely the product of New York's studied reliance on *Texas* v. *New Jersey*'s use of State of incorporation as a proxy for location.[84] Even if

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[84] New York's contempt for this Court's escheat rules did not cease even after the filing of this case. New York acknowledges

New York could so argue, the Special Master correctly found that New York did not take distributions from DTC and banks as the State of the issuer. Report 73. New York therefore could not have relied upon the previous definition of an issuer's location. *Id.*

At bottom, New York's objection to retroactivity is based, not on reliance, but on a plea of "hardship," *i.e.*, that the amount of windfall payments that it will now have to relinquish is large, and the administrative task of redistributing those funds among the States that are entitled to them is burdensome. The specter of paying a large dollar amount alone does not justify the Court's limiting its ruling to future cases, *see, e.g., McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 50 (1990), nor does New York's assertion that it would be administratively inconvenient to turn over to other States the funds that it has wrongfully seized. As the Special Master noted, New York's "failure to maintain a custodial account that exceeded more than a tiny fraction of the payment obligation exposure New York faced is not so much an issue of hardship as it is one of indifference or calculated gamble." Report 76 n.68. Indeed, under the Master's recommendations, New York would be able to retain a substantial amount of the funds it has taken, because New York is the State of the principal executive offices of a large number of issuers—a fact that may explain New York's lack of objection to the Master's recommended definition of an issuer's location.[85]

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that it continued to seize large amounts of disputed property between 1989 and 1991. *See* N.Y. Resp. No. 5(d) (April 27, 1990); N.Y. Br. 91.

[85] Delaware asks the Court to redistribute all property wrongfully taken by New York among Delaware and other States in accordance with the old locational proxy rather than the Master's proposed definition. Del. Br. 76-83. The fact that Delaware would like to maximize its future recovery, however, hardly gives rise to a claim of past reliance. Delaware also questions whether the Master's recommendation as to retroactivity might not have an

In *Pennsylvania* v. *New York*, this Court rejected an effort by the State of New York to give the decision only prospective application. The Court held there that "the *Texas* rule 'be applied to all the items involved in this case regardless of the date of the transactions out of which they arose.'" 407 U.S. at 212-13 (quoting Report of its Special Master at 21). Certain of the transactions at issue in *Pennsylvania* v. *New York* occurred as long ago as 1930, thirty-five years before the Court's decision in *Texas v. New Jersey*. *Id.* at 212. In seeking to explain away the *Pennsylvania* decision, New York asserts in its present brief that retroactivity there was compelled by "the core principle of [the Court's] escheat jurisprudence, that a State lacks the jurisdiction to unilaterally cut off the rights of other States asserting superior claims to the property." N.Y. Br. 82. That is precisely correct. *See generally Texas* v. *New Jersey*, 379 U.S. at 682. Indeed, New York's own law designates New York as a mere custodian of the disputed funds.[86] It therefore should not be permitted to cut off the Master's recommended allocation of all the disputed funds to the many States (including New York and Delaware) in which a relevant issuer maintains its principal executive offices.

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undesirable preclusive effect in future cases where (unlike here) a State can demonstrate detrimental reliance upon the "State of incorporation" locational proxy in receiving and retaining distributions. *See* Del. Br. 78-79. Insofar as Delaware's point is that the disposition in this case should not foreclose nonretroactivity arguments in other cases involving different circumstances, we register no disagreement. *See James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2444, 2446, 2448.

[86] One of the central purposes of the New York legislature's general revision of its Abandoned Property Law in 1943 was "to change the policy of the State [in takings such as are involved in this case] from confiscation to custodial protection." *In re Menschefrend's Estate*, 283 A.D. 463, 466, 128 N.Y.S.2d 738 (1954), *aff'd*, 8 N.Y.2d 1093, 170 N.E.2d 902, 208 N.Y.S.2d 453 (1960), *cert. denied*, 365 U.S. 842 (1961); N.Y. Br. 2 ("the policy of the State is custodial protection, not confiscation"). Such statutes merely authorize States to act as conservators of the property on behalf of the missing owners. *See Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 547 (1948).

CONCLUSION

The Special Master's recommendations with respect to the interpretation and application of the priority rules of *Texas* v. *New Jersey* are the product of an extraordinarily well-reasoned and faithful analysis of this Court's decisions. His selection under the backup rule of the State of the issuer over that of the conduit intermediary "is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." *Texas* v. *New Jersey*, 379 U.S. at 683. Separately, the Master's proposed modification in the backup rule's locational definition would substantially further the policies underlying *Texas* v. *New Jersey* in light of developments since 1965 without disturbing any reliance interests. Accordingly, the undersigned thirty-one States, joining sixteen other States and the District of Columbia, respectfully request that the Court adopt the Special Master's recommendations in their entirety.

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